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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CAPITOL SQUARE AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER and OHIO SENATOR RICHARD T. FINAN,
Petitioners,

v.

VINCENT J. PINETTE, DONNIE A. CARR and KNIGHTS OF THE KU KLUX KLAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICI CURIAE* KNIGHTS OF COLUMBUS COUNCIL 2961 AND DONALD L. CREATORE IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE* KNIGHTS OF COLUMBUS COUNCIL 2961 AND DONALD L. CREATORE IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI*

Amici are Knights of Columbus Council No. 2961, an unincorporated association, and Donald L. Creatore, one of its members. *Amici* have filed a petition for a writ of certiorari in *Knights of Columbus Council No. 2961* v. *Town of Trumbull*, No. 94-1242 (filed Jan. 18, 1995), which is currently pending before this Court and which presents the identical question at issue here. In that case

Trumbull, Connecticut banned *amici*'s private creche from the Town Green pursuant to a new policy, so far applied only to *amici*, that bans private religious displays from the Green, while permitting secular ones. *Amici* thus have a quite concrete interest in the present case.

Moreover, the Knights of Columbus have a long and distingushed record of defending religious liberty. It was, for example, the Knights of Columbus who underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). *Amici* file this brief with the consent of all parties.

SUMMARY OF ARGUMENT

Justice O'Connor has recently stressed that "the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Board of Education of Kiryas Joel Village School Dist.* v. *Grumet*, 114 S.Ct. 2481, 2499 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

This case illustrates the point well. Both parties seek to import endorsement analysis, which is useful in the government speech context, into a context for which it is ill-suited—private speech in a traditional public forum. This pits the Establishment Clause against the Speech Clause, and damages both in the process.

Amici respectfully suggest that the appropriate Establishment Clause analysis in cases such as this is whether the State's policy for permitting access to the forum is content-neutral with regard to religion. In other words, in public forum cases, the Establishment Clause requires only what the Speech Clause does. This mode of analysis better serves the value of government neutrality that lies at the heart of the Establishment Clause. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 *DePaul L. Rev.* 993 (1990).

And it comports well with the Court's public benefits cases under that Clause.

Such neutrality analysis also leaves intact the Court's settled Speech Clause jurisprudence. By contrast, using endorsement analysis in a private speech case risks upsetting both the prior restraint and public forum doctrines. The ad hoc decisions that government officials would be required to make when faced with permit applications for arguably religious displays would be classic prior restraints that would chill, if not proscribe protected speech.

Case-by-case endorsement analysis of private speech would also undermine this Court's public forum doctrine. It would create an exception based entirely on the mistaken impressions of third parties. Endorsement analysis could spread beyond Establishment Clause cases. For example, apparent endorsement of hate-speech could be claimed to violate the Thirteenth Amendment's prohibition on badges of servitude.

Endorsement analysis for private speech could also create multiple new and specialized tiers of public fora, based on their distance from the seat of government. The result would be the perverse rule that some speech may be banished from the quintessential public forum—the town square—precisely because it *is* the town square.

Respondents' expected argument that religious speech is permissible in a traditional public forum, near to the seat of government, only if the government does not otherwise endorse that speech is misguided. Regardless of whether the government somehow endorses it, private speech in a traditional public forum remains private speech. Perhaps the government's extraneous endorsement could be enjoined. But the private speech itself would still be protected.

ARGUMENT

Justice O'Connor recently wrote that "the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Board of Education of Kiryas Joel Village School Dist.* v. *Grumet*, 114 S.Ct. 2481, 2499 (1994) (O'Connor, J., concurring in part and concurring in the judgment). That is because "the same constitutional principle may operate very differently in different contexts." *Id.* Indeed, Justice O'Connor warned, "setting forth a unitary test for a broad set of cases may sometimes do more harm than good." *Id.*

This case proves her point. Both parties' insistence on applying endorsement analysis in a context for which that analysis is not suited—private speech in a traditional public forum—creates a conflict within the First Amendment. The Establishment Clause is said sometimes to forbid what the Speech Clause would otherwise require. This conflict menaces both clauses.

For the reasons set forth below, *amici* respectfully suggest that the appropriate Establishment Clause analysis in cases such as this is whether the State's policy for permitting access to the forum is content-neutral with regard to religion. In other words, in public forum cases, the Establishment Clause requires only what the Speech Clause does. This mode of analysis better serves the value of government neutrality that lies at the heart of the Establishment Clause, while leaving intact the Court's settled Speech Clause jurisprudence. In the present case, this analysis indicates the Court of Appeals' judgment should be affirmed.

I. ENDORSEMENT ANALYSIS, WHILE USEFUL IN GOVERNMENT SPEECH CASES, IS NOT WELL SUITED TO CASES CONCERNING PRIVATE SPEECH IN PUBLIC FORA

There is "a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education of the Westside Community Schools* v. *Mergens*, 496 U.S. 226, 250 (1990). There is, accordingly, a crucial difference in the mode of Establishment Clause analysis appropriate to each. It is a difference this Court has been careful to observe.

In *County of Allegheny* v. *ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), this Court ruled that a private party could not display a creche on the Grand Staircase inside the Allegheny County courthouse, which was *not* a public forum. Under those circumstances, the creche was sponsored by the goverment. And it was unconstitutional because it did not comply with the standards for government displays set forth in *Lynch* v. *Donnelly*, 465 U.S. 668 (1985).

> The Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche. Even if the Grand Staircase occasionally was used for displays other than the creche (for example, a display of flags commemorating the 25th anniversary of Israel's independence, *id.* at 176), it remains true that any display located there fairly may be understood to express views that receive the support and endorsement of the government. . . .

Allegheny, 492 U.S. at 600 n.50.

When, as in *Allegheny*, the government sponsors a religious display, the question becomes whether that

sponsorship violates the Establishment Clause. This has proven to be a difficult question, and one in which the Court has found endorsement analysis useful. See *Allegheny*, 492 U.S. at 623-37 (O'Connor, J., concurring in part and concurring in the judgment) (upholding menorah while striking down crèche, employing endorsement analysis); *Lynch* v. *Donnelly*, 465 U.S. 668, 687-94 (O'Connor, J., concurring) (concluding government-sponsored creche constitutional using endorsement analysis). Endorsement analysis is similarly useful in dissecting other types of religious speech by the government or its agents. See *Wallace* v. *Jaffree*, 472 U.S. 38 (1985) (O'Connor, J., concurring).

But, as Justice O'Connor noted in *Kiryas Joel*, one size of analysis does not fit all Establishment Clause cases. Thus, the *Allegheny* Court twice went out of its way to emphasize the government speech/private speech distinction, and the limits of its holding. The Court stressed that "the creche here does not raise the kind of 'public forum' issue, cf. *Widmar* v. *Vincent*, . . . presented by the creche in *McCreary* v. *Stone*. . . ." *Allegheny*, 492 U.S. at 600 n.50 (citations omitted). Later, the Court expanded on that point:

> [N]ot all religious celebrations of Christmas located on government property violate the Establishment Clause. It obviously is not unconstitutional, for example, for a group of parishioners from a local church to go caroling through a city park on any Sunday in Advent or for a Christian club at a public university to sing carols during their Christmas meeting. Cf. *Widmar v. Vincent*, 454 U.S. 263 (1981). The reason is that activities of this nature do not demonstrate the government's allegiance to, or endorsement of, the Christian faith.

492 U.S. at 612 (footnote omitted). In short, the speech at issue in *Allegheny* was government speech, for which endorsement analysis is a helpful judicial tool, not private speech for which it may not be.

This interpretation is further bolstered by this Court's subsequent involvement with religious-symbol disputes in Pittsburgh. In 1989, after *Allegheny*, a private party applied for permission to place a menorah in front of the Pittsburgh/Allegheny County City-County Building. The City denied the request, and was sued. The district court, citing the public forum doctrine, granted an injunction requiring the city to permit the display, *Chabad* v. *City of Pittsburgh*, CA No. 89-2432 (W.D.Pa. Dec. 21, 1989), but the Third Circuit then stayed the district court's order. No. 89-3792 (3d Cir. Dec. 21, 1989). On emergency application to this Court, Justice Brennan vacated the Third Circuit's stay, thus reinstating the order requiring the city to allow the display. 58 U.S.L.W. 3426 (Dec. 22, 1989). The full Court then declined to vacate Justice Brennan's order. 493 U.S. 1012 (Dec. 28, 1989). See *Americans United for Separation of Church and State* v. *City of Grand Rapids*, 922 F.2d 303, 308-09 (1990) (recounting these events). See also *Board of Trustees* v. *McCreary*, 471 U.S. 83 (1985) (mem.) (affirming, by equally divided Court, decision that Establishment Clause did not bar private creche in public park).

Justice Brennan's stay in *Chabad* was not a novelty. This Court has for more than fifty years repeatedly insisted that public fora are open to private religious expression, however unpopular that expression may be. *Cf. Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (denial of permit to religious group for use of public park violated Equal Protection Clause); *Saia* v. *New York*, 334 U.S. 558 (1948) (reversing conviction of preacher for use of loudspeaker without permit, where permit process lacked governing standards); and *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (reversing conviction of Jehovah's Witness for soliciting donations without a permit and for breaching the peace by playing anti-Catholic recording).

In recent years, the Court has strongly restated the principle that public fora are open to private religious

speech. In so doing, moreover, it has repeatedly rejected the argument that such openness constitutes improper government endorsement of religion. Thus, in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the Court ruled that a university could not exclude even religious worship from its public facilities. "[A]n open forum in a public university," said the Court, "does not confer any imprimatur of State approval on religious sects or practices." *Id.* at 274. This was true, moreover, even though the university facilities were designated (and not traditional) public fora, and the government could close them to all speech.

In *Mergens, supra*, the Court upheld the constitutionality, under the Establishment Clause, of the Equal Access Act, which guarantees religious student groups certain rights of access to public high school facilities for extracurricular activities. The Court observed that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." 496 U.S. at 250.

Most recently, in *Lamb's Chapel* v. *Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993), the Court ruled that a school board had violated the Free Speech Clause by not allowing a church group to use school premises, that were available to other groups, to exhibit a film that included religious themes. Indeed, the Court even assumed, for purposes of argument, that the school premises were a *non*public forum, *id.* at 2146-47, in which government may exclude speech on the basis of content, so long as it does not discriminate on the basis of viewpoint, see *Perry, supra*, 460 U.S. at 46. Yet, in *Lamb's Chapel*, the Court again rejected the argument that allowing private religious speech in a government-owned building would constitute improper endorsement. "Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would

think that the [School] District was endorsing religion or any particular creed . . . ." 113 S. Ct. at 2148.

A principle emerges from these two lines of cases that deserves explicit recognition by the Court: Endorsement analysis is useful in a fact-intensive inquiry into government religious displays (*Allegheny* and *Lynch*) or government religious speech (*Jaffree*), but not in dealing with challenges to private religious speech in public fora (*Widmar, Mergens*, and *Lamb's Chapel*). In this second line of cases the principal basis for decision has been the forum's neutrality with regard to religion. *Amici* repectfully submit that such neutrality, and nothing more, is what is required by the Establishment Clause in the public forum context.

Such "neutrality analysis" gives full voice to a core value of the Establishment Clause. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990).

It also comports well with the analysis in this Court's recent public-benefits cases. This Court has repeatedly held that the Establishment Clause is *not* offended when religious groups receive public benefits, according to neutral criteria, along with a broad range of other groups.

As Justice Brennan wrote in *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 14-15 (1989), "[i]nsofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." In *Witters* v. *Department of Services*, 474 U.S. 481 (1986), the Court held that aid does not violate the Establishment Clause if it is " 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution

benefitted,' and is in no way skewed toward religion." *Id.* at 487-88 (quoting *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 782-83 n.38 (1973)). See also *Board of Education of Kiryas Joel* v. *Grumet*, 114 S. Ct. 2481, 2491 (1994) ("we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges"); *id.* at 2498 (O'Connor, J., concurring in part and concurring in the judgment) ("Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion"); *Zobrest* v. *Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993) ("we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge"); *Lee* v. *Weismann*, 112 S. Ct. 2649, 2678 n.8 (1992) (Souter, J., concurring) (Establishment Clause not offended if "the State has, without singling out religious groups or individuals, extended benefits to them as members of a broad class of beneficiaries defined by clearly secular criteria"); *Mueller* v. *Allen*, 463 U.S. 388 (1983) (upholding tax deduction available to parents of all students, public, private, and parochial, even though a majority of its benefits were enjoyed by parents of parochial school students).

First-come, first-served access to public fora more closely resembles a public benefits program than it does government speech. It therefore would not be surprising if the mode of Establishment Clause analysis proper to public forum cases more closely resembled the neutrality analysis used in public benefit cases than the endorsement analysis used in government speech cases.

In sum, under our proposed neutrality analysis for public forum cases, the Establishment Clause should be construed to require the same thing the Speech Clause does: scrupulous content neutrality by the government,

and nothing more. This type of analysis not only harmonizes well with this Court's other Establishment Clause cases, it also has the significant virtue of preventing a Collision between two different clauses of the same First Amendment.

II. ENDORSEMENT ANALYSIS OF PRIVATE SPEECH WOULD UNSETTLE THIS COURT'S SPEECH CLAUSE JURISPRUDENCE

The sort of case-by-case mode of endorsement analysis that petitioners (and, to some extent, respondents) seek would create great tensions within the First Amendment. It would not only further complicate the Court's already complex Establishment Clause jurisprudence. It would also damage the Court's Speech Clause jurisprudence.

A. Endorsement Analysis Would Disrupt The Prior Restraint Doctrine

Requiring public officials to engage in their own ad-hoc endorsement analyses prior to handing out park permits would do violence to this Court's longstanding prior restraint doctrine. While applications for a creche or menorah display may seem relatively straightforward,[1] other permit applications surely will not. What if a private party (rather than the city of San Jose, California) wants to display a statute of the Aztec god Quetzalcoatl? Is that a religious display that must be banned or fully protected speech about Mexican culture that must be permitted? What of a plaque containing the text of Martin Luther King's "I Have a Dream" address, or Lincoln's Second Inaugural—is it a religious display that must be rejected, or a political display that must be al-

[1] On the other hand, even under *Allegheny*, not all *government* creches are banned—only those whose display, taken in context, suggests "a message of government endorsement," rather than "a message of pluralism and freedom to choose one's own beliefs." 492 U.S. at 634 (O'Connor, J., concurring in part and concurring in the judgment, joined by Brennan and Stevens, J.J.).

lowed? Indeed, what of the Klan cross at issue here, is it religious speech, or political speech? Would it make a difference if it were burning?

The point is not just that these questions may be troublesome. The point is that they are questions that must be answered by some petty government official in charge of handing out permits, on an ad hoc basis, and, most importantly, in advance of the symbol's display.

"It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975). Accordingly, any prior restraint on speech "bear[s] a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). This is true even for low-value expression, like obscenity, which the First Amendment permits the government to proscribe. See *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (striking down a Texas nuisance statute that permitted state authorities to enjoin future exhibition of obscene films). "[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, supra*, 420 U.S. at 559. Otherwise, uncertainty about where the line is to be drawn will surely chill, if not actually proscribe, much constitutionally-protected speech.

At a minimum, under *Freedman* v. *Maryland*, 380 U.S. 51 (1965), the following procedural safeguards would have to be observed whenever a government official denied a permit because he or she thought a display would violate the Establishment Clause:

1. "First, the burden of proving that the [display] is unprotected expression must rest on the censor [*i.e.*, the government]." *Id.* at 58.

2. "Second, while the State may require advance submission of all [such displays], in order to proceed

effectively to bar all showings of unprotected [displays], the requirement may not be administered in a manner which would lend an effect of finality to the censor's determination whether a [display] constitutes protected expression. The teaching of our cases is that because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Id.* at 58.

3. "To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing [the display]. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Id.* at 58-59.

If the Court adopts a case-by-case endorsement analysis without requiring government officials to comply with the prior restraint doctrine, that doctrine will have been badly undermined. If, on the other hand, the protections against prior restraint *are* to be complied with then the heretofore simple job of granting park permits will suddenly become complex indeed. Neither alternative is necessary if the Court saves endorsement analysis for government speech cases, and employs neutrality analysis for private speech cases.

B. Endorsement Analysis Would Disrupt The Public Forum Doctrine

Case-by-case endorsement analysis of private speech would also damage this Court's public forum doctrine. It would create a new exception based entirely on the mistaken impressions of third parties. And that exception could well expand. It is not obvious that endorsement analysis could be limited to Establishment Clause cases. The Thirteenth Amendment's prohibition on badges of servitude, for example, arguably lim-

its government speech as much as the Establishment Clause does. Under endorsement analysis States may therefore be required to deny permits for private hate-speech near government buildings.

Such a notion would be completely at odds with this Courts' teaching. A great many people were bound to misunderstand this Court's order in *National Socialist Party of America* v. *Skokie*, 432 U.S. 43 (1977) (per curiam) (reversing denial of stay, permitting Nazi parade through neighborhood with many Holocaust survivors), but that did not stop the Court from issuing it. *Cf. FCC* v. *League of Women Voters*, 468 U.S. 364, 407 (1984) (restrictions on editorializing by federally-subsidized public broadcasters held unconstitutional despite Congress's intent "to avoid the appearance of government sponsorship of a particular view or a particular political candidate" (Rehnquist, J., dissenting)); *Doe* v. *Small*, 964 F.2d 611, 630 (7th Cir. 1992) (en banc) (Easterbrook, J., concurring) ("If hecklers cannot silence political speech in a public forum, obtuse observers cannot silence religious speech in a public forum").

Endorsement analysis for private speech could also create new and specialized tiers of public fora. Petitioners would distinguish between fora close to the seat of government, from which religious speech (and, perhaps, hate-speech) may be banned, and those more remote from government where such expression would be permitted. (In addition to further complicating public forum analysis, such a rule would also be perverse. It would hold that some speech may be banished from the quintessential public forum—the town square—precisely because it *is* the town square.)

Respondents, on the other hand, are expected to argue that religious speech is permissible in a traditional public forum, near to the seat of government, but only if the government does not otherwise endorse that speech. This, too, is a curious theory. Regardless of whether the gov-

ernment somehow endorses it, private speech in a traditional public forum remains private speech in a traditional public forum. Perhaps the government's extraneous endorsement would be improper and could be enjoined. But the private speech itself would still be protected. Otherwise, the government would have an implicit and ironic veto over religious speech. It could effectively ban it by publicly embracing it.

In short, endorsement analysis, while valuable in the government-speech category of cases, threatens to "do more harm than good" in the private speech context. *Cf. Board of Education of Kiryas Joel Village School Dist.* v. *Grumet*, 114 S.Ct. 2481, 2499 (1994) (O'Connor, J., concurring in part and concurring in the judgment). Neutrality analysis, on the other hand, creates no tension with the Speech Clause, and melds easily with the Court's other Establishment Clause cases.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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